84-680

No. .....

In The

Supreme Court of the United States

October Term, 1984

CAMEO CONVALESCENT CENTER, INC.,
a Wisconsin corporation,

Cross-Petitioner,

vs.

DARLA C. SENN, et al.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. What are the proper standards applicable in determining whether a misuse or abuse of legal process, undertaken under color of state law, constitutes a violation of the Fourteenth Amendment Due Process Clause?

2. Did the Seventh Circuit Court of Appeals violate the cross-petitioner's Seventh Amendment right to a jury trial when it vacated the jury verdict in favor of the cross-petitioner and substituted its judgment for that of the jury on a question of fact?

PARTIES TO THE PROCEEDINGS BELOW

Cross-Petitioner, Cameo Convalescent Center, Inc., and in addition, the plaintiffs Dragomir Kresovic, Borislav Kresovic and Linda Hintz.

Cross-Respondent, Darla C. Senn, and in addition, the defendants, Donald E. Percy, Robert Durkin, Charles J. Fiss, Jr., Peggy Ann Smelser, Louis E. Remily, David L. Siegel, Thomas G. Van de Grift, Milton J. Stearns, Fran Richards, Kathleen Rubin, Nancy Kacynski, and Janet Zanck.

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CROSS-PETITION FOR WRIT OF CERTIORARI

—o—

Cross-Petitioner, Cameo Convalescent Center, Inc.[1] of Wisconsin, respectfully prays that a writ of certiorari

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[1] Pursuant to Rule 28.1, Cameo asserts that it has no parent company, subsidiaries or affiliates.

issue to review that portion of the orders of the United States Court of Appeals for the Seventh Circuit, entered on June 29 and July 30, 1984, which vacated the judgment of the United States District Court for the Western District of Wisconsin in favor of the cross-petitioner and against the cross-respondent, Darla C. Senn.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is published at 738 F.2d 836 (7th Cir. 1984). The decision of the district court is not published but is contained in the cross-petitioner's appendix, pp. 1A-4A.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was originally entered on June 29, 1984. That court subsequently denied the cross-petitioner's motion for rehearing but amended its decision by order entered on July 30, 1984. A petition for certiorari was filed with this Court by the cross-respondents within 90 days of the entry of the order denying rehearing. That petition for certiorari was received by the cross-petitioner on September 27, 1984. This Court's jurisdiction is invoked under 28 U. S. C. §1254(1) and Supreme Court Rule 19.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment to the United States Constitution, Article VII.

> "[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment to the United States Constitution, Article XIV, Section 1:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . . "

United States Code, Title 42: §1983 Civil Action for Deprivation of Rights:

> "Every person who, under color of any statute, ordinance, regulation, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The operative state statutes are quoted in the petition for certiorari filed by the cross-respondents.

STATEMENT OF CASE

This is an action for legal and equitable relief under the First, Ninth, and Fourteenth Amendments to the United States Constitution, and the Civil Rights Act of 1871, 42 U.S.C. §1983 (R. 70, Second Amended Complaint). Cross-petitioner contended that it was denied its Fourteenth Amendment rights by Darla Senn, both individually and through an ongoing conspiracy of the remaining defendants. Darla Senn and the other defendants are alleged to have done this by abusing the regulatory process

of the Department of Health and Social Services. Additional facts are contained in the brief in opposition to the petition for certiorari.

Specifically, Cameo contends that it was cited for numerous violations of Wisconsin's nursing home regulations without any reasonable basis in fact or law. The pursuit of these alleged violations through the hearing process and other enforcement actions continued despite the defendants' knowledge that there was no reasonable basis for them and ultimately led to other sanctions, including placing Cameo on a suspension of referrals (SOR) list.

Cameo is a family-owned corporation whose primary business is operating a licensed nursing home. (R. 219, Tr. Vol. I, p. 3)

The Wisconsin Department of Health and Social Services is the agency of the State of Wisconsin which is responsible for the inspection and licensing of nursing homes in the State of Wisconsin. (R. 219, Tr. Vol. I, p. 14) Surveys of nursing homes in the State of Wisconsin were conducted annually by surveyors employed by the Department of Health and Social Services. (R. 219, Tr. Vol. I, pp. 14-15) All initial defendants, including Darla Senn, were officers or employees of the Department of Health and Social Services. (R. 70, Second Amended Complaint, pp. 5-7; R. 77, Answer to Second Amended Complaint) Darla Senn was a nurse-surveyor for the Department of Health and Social Services. (Tr. 215, Tr. Vol. IV, pp. 118 & 219)

The initial event giving rise to plaintiff's claim occurred on September 19, 1978, when Cameo was served

with 34 Notices of Violation ("NOV's"). (R. 219, Tr. Vol. I, p. 45; Ex. 22; Ex. 23) Thirty-one of those NOV's were served on the home by Senn. Cameo introduced evidence that shortly after serving the NOV's on Cameo, Senn commented to another state surveyor, "You know, I intend to screw them [Cameo]." (Ex. 327)

A timely appeal of those NOV's was filed by Cameo on September 29, 1978. (R. 219, Tr. Vol. I, p. 49; Ex. 36) Despite Cameo's timely appeal, no hearing was scheduled by the Department within the 30 days required by Wis. Stat. §50.04(e). (R. 219, Tr. Vol. I, pp. 54, 64-65; Ex. 54) There was substantial evidence in the record from which the jury could infer that all, or a substantial portion, of the delay was attributable to Senn's failure to cooperate with other agency personnel in providing information requested, not only by Cameo, but also by agency personnel responsible for moving forward to hearing. (Resp. App., p. 1A)

On March 21, 1979, Cameo received notice that it was being placed on the "suspension of referrals" list for April of 1979. (Resp. App. pp. 10A-12A) Wis. Stat. §50.04(4)(d) prohibits placement on that list until any requested hearings have been completed. Notwithstanding Cameo's timely request for a hearing, Cameo was placed on the suspension of referrals list in April of 1979, and that list was mailed to over 600 recipients, without Cameo being afforded an opportunity for a hearing. (R. 219, Tr. Vol. I, pp. 62-63; Ex. 111; Ex. 121; R. 214, Tr. Vol. IV, pp. 102, 110, 112-113)

The record is replete with evidence of the lack of merit to the NOV's themselves. (Cross-Pet. App. 7A-13A;

Resp. App. pp. 1A-9A) Ultimately these NOV's were disposed of by stipulation (Ex. 256).

A bifurcated trial was held to a jury on the issues of liability and damages. Prior to submission of the cause to the jury, the district court instructed the jury that cross-petitioner's claims were based upon the Fourteenth Amendment and that the cross-petitioner sought damages for deprivations of its "property." The court also gave the jury general instructions to the effect that the Fourteenth Amendment and 42 U.S.C. §1983 were designed to protect against certain "deprivations" of legally protected interests. (Cross-Pet. App. 13A-14A)

The jury found that Defendant Senn had engaged in unconstitutional malicious prosecution by initiating and maintaining NOV's against Cameo without probable cause, and that she had engaged in unconstitutional abuse of legal process because she had done so with an improper or ulterior motive. The jury found that Cameo had suffered ordinary damages of $65,000 as a proximate result of these actions, and imposed punitive damages in the amount of $10,000 due to the defendant's malice.

On December 8, 1982, pursuant to Federal Rules of Civil Procedure 50(b) and 59(e), the court dismissed the post-trial motions filed by Darla Senn for judgment notwithstanding the verdict and to amend the judgment to one of no liability. (Cross-Pet. App. 1A-4A) On December 28, 1982, Senn filed a notice of appeal from the court's December 8, 1982 decision on the merits. On January 5, 1983, Cameo also filed a timely notice of appeal with respect to the dismissal of the remaining defendants.

On appeal to the Seventh Circuit Court of Appeals, Senn did not deny that her acts of malicious prosecution

and abuse of process had occurred. She instead argued that she should be absolutely immune from liability for her acts under prosecutorial immunity[2] and that her acts are not actionable under 42 U.S.C. §1983 because they did not constitute a deprivation of constitutional magnitude. The court of appeals set aside the jury verdict against Senn, finding, apparently on its own independent review of the record, that "Senn's issuance of the NOV's is simply too attenuated to permit this court to hold that Senn subjected or caused Cameo to be subjected, to the deprivation of due process." (Pet. App. at p. 46)

REASON FOR GRANTING THE CROSS-PETITION

The factors which this Court should consider in determining whether to grant a petition or cross-petition for certiorari are contained in Supreme Court Rule 17. That section provides that certiorari is appropriate where the petition seeks to review a decision of a federal court of appeals which is in conflict with the decision of other courts of appeals on the same matter or where a court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In addition, a writ of certiorari would also be appropriate where a federal court of appeals has decided an important question of federal law which has not previously been, but should

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[2] Senn, in fact, never raised the defense of prosecutorial immunity in her answer to the complaint. Only two of the defendants, lawyers Siegel and Van de Grift, had interposed that defense. (Cross-Pet. App. 4A) Nevertheless, the district judge submitted Senn's immunity defense to the jury, over the objections of cross-petitioners, and the jury found no immunity. (Pet. App. pp. 58 and 61)

be, finally settled by the Supreme Court, or has decided a federal question in a way which is in conflict with the applicable decisions of this Court.

We believe that this cross-petition for certiorari should be granted, under those standards, for two reasons. First of all, the decision of the circuit court was in conflict with the decisions of other circuit courts on the same issue and that issue is an important issue of federal law which has never been decided by this Court. Second, we believe that the circuit court, in substituting its judgment for that of the jury, has so far departed from the usual and accepted course of judicial proceedings, and brought itself into conflict with the decisions of this Court, so as to call for an exercise of this Court's power of supervision.

I. THE STANDARDS TO BE APPLIED IN DETERMINING WHEN THE ABUSE OR MISUSE OF LEGAL PROCESS ALSO CONSTITUTES A VIOLATION OF DUE PROCESS IS AN IMPORTANT FEDERAL QUESTION REQUIRING DECISION BY THIS COURT.

It is perhaps ironic that, while this Court has painstakenly deliniated the requirements which must be met in order for certain public officials to qualify for absolute immunity from liability under 42 U.S.C. §1983 for any abuse or misuse of legal process, see *Dennis v. Sparks*, 449 U.S. 24 (1980), *Butz v. Economou*, 438 U.S. 478 (1978), and *Imbler v. Pachtman*, 424 U.S. 409 (1976), it has never addressed the underlying, and more fundamental, question of what factors will bring the victim of a misuse or abuse of legal process within the protection of the due process clause.

This Court has noted that the deterrence of future abuses of power, by persons acting under color of state

law, was an important purpose in the adoption of §1983, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981). Where a public official, under color of state law, abuses or misuses the state's legal machinery in order to obtain some impermissible purpose, that conduct would clearly seem to be an abuse of power, and hence the type of evil which §1983 was enacted to prevent. Thus, our analysis must recognize that, at least in some circumstances, abuse or misuse of legal process is constitutionally proscribed. The circumstances under which the Constitution is offended by that conduct, however, is more elusive.

This Court has addressed the question of when an act of defamation may rise to the level of a due process deprivation in *Paul v. Davis,* 424 U.S. 693 (1976) and *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). Lower courts have generally tried to apply the principles of these cases to abuse or misuse of process claims, but without any degree of consistency. The differing nature of the two types of torts does not usually lead to a meaningful comparison.

The two major differences lie in the nature of the wrong committed and in the nature of the interests at stake and ultimately deprived. In *Paul v. Davis,* and its genre, the wrong committed was the failure to provide a meaningful hearing when there is a threat to a protected interest. The interest which was threatened and the interest which was ultimately deprived are the same. In an abuse of process or malicious prosecution claim, the wrong committed is the compelling of a person to go through a meaningless hearing, under threat of loss of a protected interest. In such a case, the interest which is ultimately taken is probably not the same interest which was at stake in the proceeding.

For example, in those cases where a protected interest has been deprived through defamation, the obvious remedy to such intentional or erroneous deprivation is to require some form of a hearing before the deprivation occurs. See, for example, *Mathews v. Eldridge,* 424 U.S. 319 (1976). It is the denial of a meaningful opportunity to be heard which forms the basis of liability in this type of case.

In an abuse or misuse of process case, on the other hand, the injured party has not been denied a hearing. His complaint is that, without probable cause and for no good reason, the hearing process, and its accompanying costs and losses, have been thrust upon him. In other words, in an abuse or misuse of process case, a due process hearing would not serve as a check *against* the infliction of injury. The hearing, instead, serves as the mechanism *for* the infliction of injury.

The fact that public officials readily recognize that litigation can be used to "punish" disfavored parties is demonstrated by the record in this case. (Cross-Pet. App. 5A-7A) An Assistant Attorney General, who was assigned to seek enforcement of three subpoenas objected to by Cameo, acknowledged that the subpoena enforcement action had been initiated, in lieu of simply reissuing the subpoenas in unobjectionable form, to "penalize" Cameo for "lack of cooperation in other respects." See also the recogniton by Defendant Van de Grift, of the State's superior economic ability to pursue the litigation and his willingness to use that superior ability, in a June 13, 1979 memo. (Cross-Pet. App. 6A-7A)

Similarly, one of the necessary elements of malicious prosecution is that the litigation has been terminated fa-

vorably to the plaintiff. *Morrison v. Jones,* 551 F.2d 939 (4th Cir. 1977) and *Kelly v. Cooper,* 502 F. Supp. 1371 (E.D. Va. 1980). This means that in most cases, where the plaintiff can prove that malicious prosecution has occurred, the defendant would never have accomplished the "taking" of the liberty or property interest which he initially sought due to the fact that the plaintiff prevailed in the litigation. Indeed, if a taking in the *Paul v. Davis* sense does occur, it is usually as a result of a collateral matter, not as a result of the pursuit of vexatious litigation itself. In this case, for example, Cameo's right to receive referrals from state and county agencies was taken, but that taking resulted, at least in part, because of the collateral suspension of referrals procedure, which is unique to Wisconsin law.

What the perpetrator would really have "taken," however, in such a situation, is his victim's legitimate expectation of being free from vexatious litigation, which threatened a protected interest, pursued at public expense, by a public official acting under color of state law.

Given these fundamental differences between these types of cases, neither *Paul v. Davis* nor *Wisconsin v. Constantineau* provide reliable guidance to a lower court attempting to resolve an abuse or misuse of process claim.

In the absence of any specific guidance from this Court, the circuit courts have developed a myriad of, often conflicting, standards. See, for example, *Roy v. City of Augusta,* 712 F.2d 1517 (1st Cir. 1983); *Mayer v. Wedgewood Neighborhood Coalition,* 707 F.2d 1020 (9th Cir. 1983); *Cline v. Brusett,* 661 F.2d 108 (9th Cir. 1981); *Marrero v. City of Hialeah,* 625 F.2d 499 (5th Cir. 1980); *Beker*

Phosphate Corporation v. Muirhead, 581 F.2d 1187 (5th Cir. 1978); *Jennings v. Shuman,* 567 F.2d 1213 (3rd Cir. 1977); *Wells v. Ward,* 470 F.2d 1185 (10th Cir. 1972); *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971); and, *Nesmith v. Alford,* 318 F.2d 110 (5th Cir. 1963).

In some instances, different panels of the same circuit, including the Seventh Circuit Court of Appeals, have been unable to agree on the appropriate standards governing §1983 liability. Compare, for example, the standards set forth by the court of appeals in the fifth circuit in *Marrero,* with the standard previously utilized by a different panel in *Beker Phosphate.* Compare also the standards of the circuit court in this case, *Cameo Convalescent Center v. Senn,* 738 F.2d 836 (7th Cir. 1984) with a prior holding by another panel in *Hampton v. City of Chicago,* 484 F.2d 602, 609 (7th Cir. 1973).

In *Marrero,* the fifth circuit panel held, after an exhausting analysis of *Paul,* that a loss of business occasioned by the unfavorable publicity generated by a bad faith prosecution constituted a sufficient deprivation of a protected interest to trigger a due process violation, stating that:

> "Since that interest [goodwill] is a protected property interest under Florida law, Florida may not deprive appellants of that interest without due process of law. Just as a state may not physically destroy a person's tangible property without complying with the requirements of the Fourteenth Amendment, so it may not destroy through the medium of speech a person's intangible property without the same compliance.
>
> * * * *
>
> When the government impairs those interests by leveling defamatory charges of a kind which also ines-

> capably harm an individual's protected business interests, the reputational interests rise to the level of liberty interests. . . ." 625 F.2d at pp. 515-516.

In its earlier case of *Beker Phosphate,* on the other hand, the court refused to recognize the lawful use and enjoyment of property for a business purpose as a sufficient taking of a protected interest to trigger due process considerations. That Court did, however, by way of explanation, indicate that its decision was based on the policy that "it is more important that the applicable rule of law be settled than that it be settled right" 581 F.2d at p. 1190, n. 10, quoting Justice Brandeis in his famous dissent in *Burnet v. Coronado Oil and Gas,* 285 U.S. 393 (1932). This seems to indicate that the court was not fully comfortable that its decision was the correct one. *Beker Phosphate* was one of the decisions upon which the court below primarily relied in vacating the judgment in this case.

In *Hampton,* the Court of Appeals for the Seventh Circuit specifically held that an allegation that malicious prosecution had resulted in additional legal expenses was sufficient to state a cause of action under 42 U.S.C. § 1983.

> "We are satisfied that the post-raid charges against Hanrahan, Jalovek, and the fourteen police officers are sufficient under both § 1983 and § 1985 (3).
>
> * * * *
>
> The complaints alleged that as a direct result of the conspiracy the unfounded prosecution was continued *. . . and plaintiffs incurred expenses in preparing their defense. . . . [M]atters such as the extent of injury and causal connection raise questions for the trier of fact.*
>
> * * * *

> If the alleged conspiracy did exist, . . . and if it did prolong a completely unfounded prosecution, plaintiffs are entitled to relief. . . . " 484 F.2d at 609-610. (Emphasis added)

In the instant case, on the other hand, a different panel of the Seventh Circuit refused to recognize being free from unfounded litigation by governmental officials and its accompanying expense as a protected interest. That panel found such an intrusion not to be a sufficient deprivation so as to trigger a Fourteenth Amendment due process claim.

Just a sampling of some of the criteria being applied by other circuit courts should illustrate the need for a uniform standard by this Court. In *Roy v. City of Augusta*, the Court of Appeals for the First Circuit held that a due process violation was stated where the state courts afforded due process but the defendants frustrated that process. There, the end result of litigation over a license was that the plaintiff ultimately lost his business because of the drain of the litigation and changes in economic conditions during the pendency, though the business was not "taken" by the defendants in the traditional sense.

In *Mayer v. Wedgewood Neighborhood Coalition*, the Ninth Circuit Court of Appeals denied a claim for attorney's fees against a plaintiff whose § 1983 suit was dismissed for lack of standing. The complaint did not allege any deprivation other than that the plaintiff had been required to participate in meritless litigation in order to protect its interests. The ninth circuit held that allegation to state a claim under § 1983, stating:

> "While normally protected by the First Amendment, the invocation of administrative or judicial proceed-

> ings may be tortious and actionable if employed for a purpose that is unlawful and is other than and in addition to the goal sought openly in the proceeding itself. . . . Plaintiff alleged defendants engaged in baseless opposition in various administrative and judicial proceedings to delay this project. . . . [*T*]*he parties' motivation*, and therefore the merit of plaintiff's suit, is a factual matter. . . ." 707 F.2d at p. 1023. (Emphasis added)

A similar result was reached on the merits by the Third Circuit Court of Appeals in *Jennings v. Shuman*. The court in *Jennings* concluded that:

> "An abuse of process is by definition a denial of procedural due process . . . [and] states an injury actionable under section 1983." 567 F. 2d at 1220.

In *Wells v. Ward*, on the other hand, the Tenth Circuit Court of Appeals focused not on the question of whether the interest asserted was a property or liberty interest, but rather on the question of whether the taking had been "substantial." In that case, the individual charged had actually been deprived of a liberty interest, having been arrested and denied bail. Yet that court held that the deprivation was not sufficiently "substantial" to constitute a violation of 42 U.S.C. § 1983.

In *Madison v. Manter*, the First Circuit Court of Appeals, in attempting to determine what was required in order to formulate an abuse of process claim under § 1983, focused on the question of whether the actions of the defendant were intentional and malicious. That court, in its reasoning, clearly implied that negligent or reckless conduct in bringing unfounded litigation would not run afoul of the due process clause, while intentional and malicious conduct would. The requirement of some additional "taking" was never mentioned.

This state of confusion has led at least one district judge, in attempting to discern some consistent standards to apply to a case pending in his court, to comment that:

> "Consistency has not been the mark of the treatment of § 1983 actions brought for malicious prosecution. . . ." *Henry v. City of Minneapolis*, 512 F. Supp. 293, 296 (D. Minn. 1981).

Because of this wide divergence of opinions among the circuit courts, and because under the *Marrero*, *Jennings*, and *Hampton* line of cases, liability would clearly lie in this case, this Court should exercise its discretion and grant this cross-petition for certiorari in order to resolve this important federal question. For, as Justice Brandeis earlier recognized, supra, it is important that the issue be settled.

II. THE CIRCUIT COURT DEVIATED FROM ACCEPTED PROCEDURE AND PREVIOUS RULINGS OF THIS COURT IN SETTING ASIDE THE JURY VERDICT AND INDEPENDENTLY RENDERING A FACTUAL HOLDING ON THE PROXIMATE CAUSE QUESTION.

We believe that this cross-petition for certiorari should also be granted so that the court can exercise its supervisory role in determining: (1) whether the court of appeals substantially deviated from accepted procedure and this Court's holdings in vacating the jury verdict and interjecting its own findings on a factual question; and (2) whether that court's findings are also in conflict with legal principles set forth in prior decisions of both this Court and other courts of appeal.

A. The Circuit Court Improperly Invaded The Province Of The Jury.

As the Seventh Amendment clearly indicates, jury verdicts are not to be "otherwise re-examined" except ac-

cording to the rules of the common law. In applying this principle to federal claims, this Court has consistently held that, on questions relating to proximate cause, jury verdicts are to be upheld if there is, in any view, sufficient evidence to sustain them. See, for example, *Davis v. Baltimore and Ohio Railroad Company*, 379 U.S. 671 (1965), *Harrison v. Missouri Pacific Company*, 372 U.S. 248 (1963), *Gallick v. Baltimore and Ohio Railroad Company*, 372 U.S. 108 (1963), *Arnold v. Panhandle and Santa Fe Railway Company*, 353 U.S. 360 (1957), and *Tenant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29 (1944).

This doctrine was first announced by this Court in *Tenant, supra*. In that case, a widow sought compensation under the Federal Employer's Liability Act for the alleged wrongful death of her husband during the course of his employment as a member of the railroad switching crew.

The plaintiff had argued that her husband's death was caused by the negligence of the railroad crew in failing to sound the engine bell prior to moving the engine. The jury returned a verdict for the plaintiff and the district court entered judgment on that verdict. The defendants, in their appeal, had contended that the jury's finding that the decedent's death was caused by the failure to sound the bell was mere speculation, since the plaintiff had never established any causal relationship between the failure to ring the bell and the accident. The court of appeals agreed with the defendant and reversed the district court's judgment, finding that there was insufficient evidence of proximate cause to support the jury verdict. This Court reversed that finding by the circuit court, stating that:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . It is the jury, not the court, which is the fact-finding body. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." 321 U.S. at p. 35.

This Court subsequently expanded upon its holding in *Tenant* in *Gallick v. Baltimore and Ohio Railroad Company, supra.* In *Gallick,* this Court reversed a decision by a court of appeals which had set aside a jury verdict in favor of the plaintiff on the proximate cause issue. In doing so, the Court concluded that:

> "We think that the Court of Appeals improperly invaded the function and province of the jury. . . ." 372 U.S. at p. 113

In *Gallick,* a railroad spotting crew foreman had brought suit against the railroad under the Federal Employer's Liability Act alleging that he was bitten by an insect while working on the railroad right-of-way. He contended that that insect bite resulted in a wound which subsequently became infected, that the infection failed to respond to any medical treatment, that it worsened progressively, and that ultimately the condition necessitated the amputation of both of his legs.

The court of appeals in *Gallick,* in reversing the jury verdict originally returned for the plaintiff, found that there was insufficient evidence to find that the defendant's negligence was the proximate cause of the insect bite, and that the nature and degree of injuries sustained by the plaintiff were beyond the realm of reasonable probability or foreseeability by the defendant. That court had relied

heavily upon certain findings made by the jury in its special verdict to establish inconsistency between portions of the verdict. That inconsistency was then used to justify an independent examination and factual determination by the court of appeals.

The jury had found, as part of its special verdict, that there was no reason for the defendant to anticipate that the action complained of would or might probably result in a mishap or injury. The jury also negatively answered the question of whether the harm sustained by the plaintiff was within the realm of reasonable probability or foreseeability of the defendant.

Thus, the issue presented to this Court in *Gallick* was whether jury findings, which appeared in certain particulars to be inconsistent with the overall finding of liability, were properly used by an appellate court to impeach the overall verdict. In answering that question in the negative, this Court stated that:

> "[I]t is the duty of the courts to attempt to harmonize the answers, if it is possible after a fair reading of them." 372 U.S. at p. 119.

The circuit court in this case did the same thing as the circuit court in *Gallick*. In setting aside the verdicts on the abuse of process and malicious prosecution counts, the court of appeals relied on the jury's answer to a special verdict question on another count in the complaint. That answer indicated that none of the defendants were "personally and directly responsible" for Cameo's placement on the SOR list, "*and* acted with intentional or reckless disregard" of Cameo's appeal rights. However, the using of this ambiguous finding, to impeach two clear

findings of liability on other counts, runs afoul of the standards set forth in *Gallick, supra.*

It is true, of course, that the jury in this case did not specifically find, because it was never specifically asked to find, that the actions of Senn were a proximate cause of Cameo's placement on the SOR list. The jury did find, however, after being properly instructed on the requirement that there needed to have been a "deprivation" in order to violate due process, that Darla Senn was liable on two separate theories.

We must keep in mind that the jury's answers to the verdict questions on malicious prosecution and abuse of process were not rendered in a vacuum. They were rendered only after the jury had been instructed on the applicable law by the trial court. Thus, in construing the jury's answers to the special verdict questions, we must construe those answers in light of the instructions which the jury had been given.

Prior to retiring to deliberate its verdict, the jury was specifically instructed by the court that Cameo's claims were based upon an alleged deprivation of a protected interest under the due process clause of the Fourteenth Amendment. (Cross-Pet. App. 13A-14A) The trial court further instructed the jury that § 1983 provides only that an inhabitant may seek redress by way of damages for a "deprivation of any rights, privileges or immunities," and that "the Fourteenth Amendment to the Constitution provides . . . nor shall any State *deprive* any person *of life, liberty or property* without due process of law; . . . ." (Cross-Pet. App. 13A-14A) (Emphasis added). Thus, the jury was aware, because it had been properly instructed, that the claims of the plaintiff were predicated

upon the existence of a deprivation of a protected Fourteenth Amendment liberty or property interest.

Assuming, as we must, that the jury rendered its verdict in compliance with the instructions which it had been given, it logically follows that the jury, in finding that Senn had committed the proscribed acts, did find the requisite deprivation to have occurred. And, once that jury finding has been made, it is insulated from attack on review as long as there is any evidence to sustain it, *Gallick, supra.*

This view of the jury verdict is further buttressed by the district court's ruling, shortly after that verdict had been rendered, on the cross-respondent's motion for judgment notwithstanding the verdict and to amend the judgment to one of no liability. In denying that motion, the district court analyzed the arguments of Senn and, in rejecting them, based its decision on two alternative grounds. First, that court concluded that malicious prosecution and abuse of process themselves constituted violations of due process, citing, *Jennings v. Shuman, supra.* The court also, however, based its holding on the alternative and independent ground that the verdict was supported by evidence that the acts of Senn did subject the plaintiff to a deprivation of constitutional magnitude, citing *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979). (Cross-Pet. App. 1A-4A)

That court reasoned as follows:

> "The nursing home violation citations written by her *started a process which could have resulted in denial of* the nursing home's right to receive patients, *a property right* by virtue of various provisions of state law. There was also evidence that she involved herself in the hearing process although she was not

personally or directly responsible for a number of subsequent events *that followed naturally from the initial issuance of citations.*" (Cross-Pet. App. 2A) (Emphasis added)

Thus, since it is reasonable to conclude that the jury did find the requisite deprivation, and there is adequate evidence in the record to support that finding under the standards set forth in *Gallick v. Baltimore & Ohio Railway* and *Tenant v. Peoria and Pekin Railway Company, supra,* this Court should grant certiorari in order to exercise its supervisory jurisdiction to correct the error of the circuit court in setting aside that verdict.

B. The Legal Standards Applied By The Circuit Court In Finding No Proximate Cause Are In Conflict With Prior Rulings Of This Court And Of Other Applicable Courts of Appeal.

The circuit court based its decision, setting aside the jury verdict against Senn and in favor of the cross-petitioner, on the grounds that "the nexus between the infringement upon Cameo's constitutionally protected rights and Darla Senn's issuance of the NOV's is simply too attentuated to permit this court to hold that Senn subjected, or caused Cameo to be subjected, to the deprivation of due process." (Pet. App. at p. 46) In reaching this conclusion, the court relied upon the fact that a number of other events followed Senn's issuance of the NOV's which may have contributed to Cameo's placement on the SOR list. The court emphasized that between the issuance of the NOV's and Cameo's placement on the SOR list, there were two further verification visits of Cameo, meetings held among WDHSS officials concerning Cameo's NOV's, and the "mishandling" of Cameo's timely appeal. In short, the circuit court relied upon intervening acts by

other defendants, which may have contributed to the ultimate injury which Cameo suffered, as relieving Senn of any legal responsibility for Cameo's placement on the SOR list.

This Court has held, however, that intervening acts of other defendants do not relieve an original actor from liability, so long as the original acts are still operative and contribute to the resulting injury. It stated this rule as follows:

> "The rule is settled by inumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone." *Miller v. Union Pacific Railroad Company,* 290 U.S. 227, 236 (1933).

This ruling is consistent not only with the prevailing decisions of the circuit courts of appeal, but also with the applicable state law of Wisconsin. See, for example, *Elliott v. Michael James, Inc.,* 559 F.2d 759, 764 (D.C. Cir. 1977), *Hicks v. United States,* 511 F.2d 407 (D.C. Cir. 1975); *William G. Roe and Company v. Armour and Company,* 414 F.2d 862, 870 (5th Cir. 1969); *Phillips Petroleum Company v. Hardee,* 189 F.2d 205 (5th Cir. 1951); *Heims v. Hanke,* 5 Wis. 2d 465, 471, 93 N.W.2d 455, 459 (1958); and, *Bolick v. Gallagher,* 268 Wis. 421, 427, 67 N.W.2d 860, 863 (1954).

In *Miller,* this Court, after noting that under the federal rules the burden of proving contributory negligence as an intervening cause is on the defendant, went on to examine, and concur with, a previous decision by a circuit court in *Memphis Consolidated Gas & Electric Company v. Creighton,* 183 F. 552, a gas explosion case. In *Creighton,* the gas company had been shown to be negligent in allowing leaking gas into a building. There was, however, a more

direct and immediate negligence on the part of another individual. That person had lighted a match in order to determine the source of the smell of gas. In holding the gas company liable, despite the intervening negligence of the other individual, the court stated that:

> "The truth of the matter is that the causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. The effect of the former had not ceased, but cooperated with that of the other in effecting the injury. In such case an inquiry about the proximate cause is not pertinent, for both are liable." 290 U.S. at pp. 236-237 quoting *Memphis Consolidated, supra.*

The instant case is on all fours with the rationale set forth in *Miller*. There were two primary causes for Cameo's placement on the suspension of referrals list. The first, of course, was the issuance of the NOV's by Senn in the first instance. It was, after all, the issuance of these unwarranted NOV's which set in motion the enforcement machinery which ultimately led to Cameo's placement on the SOR list.

The second primary operative cause was the failure to provide Cameo with the predeprivation hearing mandated by the due process clause. Neither of those causes, however, could have been independently responsible for Cameo's placement on the list. The two causes therefore acted together in order to work the one, indivisible, injury which occurred.

Therefore, just as in the *Memphis Consolidated Gas & Electric* case, both wrongs are the proximate cause of Cameo's injury. It follows that, under *Miller,* either or both of the responsible parties are liable for the injuries

which occurred and the judgment against Senn should not have been set aside.

For, as the Fifth Circuit Court of Appeals noted in *Phillips Petroleum Company, supra,* "[Where] the independent tortious acts of two or more persons supplement one another and concur in contributing to and producing a single indivisible injury, such persons have in legal contemplation been regarded as joint-feasors, notwithstanding the absence of concerted action." 189 F.2d at p. 212.

In *Roe, supra,* the circuit court found that "[j]oint and several liability is established, however, where an act, subsequent in time, concurs with a prior cause to produce 'inseparable' damages." 414 F.2d at p. 870.

Nor would the result change if this Court were to apply, as one circuit court applied in *McCulloch v. Glasgow,* 620 F.2d 47 (5th Cir. 1980), state law in determining the issue of proximate cause. *McCulloch* was a civil rights case under § 1983, and that court applied the state law on the proximate cause question.

The existing proximate cause rule in Wisconsin is no different than that set forth in *Miller* and *Roe* above. It provides that:

> "It is an elementary principle that where independent torts result in separate injuries, each tort-feasor is separately liable for his own torts. . . However, it is also an established principle that where independent torts concur to inflict a single injury, each tortfeasor is liable for the entire damage. 86 C.J.S. Torts, p. 951, § 35." *Bolick v. Gallagher, supra,* 268 Wis. at p. 427.

See also, *Heims v. Hanke, supra.*

Thus, it follows that whether the applicable law on proximate cause is the federal law or the state law, the circuit court's decision was erroneous. It conflicts with both.

This Court should therefore grant the cross-petition for certiorari in order to exercise its supervisory power to correct this error of the circuit court in detemining the rights of the parties under the Federal Civil Rights Act.

CONCLUSION

For the above-stated reasons, cross-petitioner contends that its cross-petition for certiorari on the issues presented should be granted and the matter should be set for briefing and argument on the merits.

Dated this 26th day of October, 1984.

Respectfully submitted,

ROBERT M. HESSLINK, JR.
Attorney for Cross-Petitioner

121 South Pinckney Street
P.O. Box 2509
Madison, WI 53701
(608) 255-8891

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

79-C-570

CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs,

v.

DONALD E. PERCY, et al.,

Defendants.

MEMORANDUM AND ORDER

The matter, having come on for trial before a jury which returned a verdict of liability against defendant Darla Senn on September 22, 1982, and a verdict for damages against Darla Senn for $65,000 in compensatory damages and $10,000 in punitive damages on October 5, 1982, is now before the Court for defendant Darla Senn's motions after verdict. The motions are for judgment notwithstanding the verdict pursuant to Rule 50(b), and for amendment of the judgment pursuant to Rule 59(e). The motions are denied.

MEMORANDUM

I. AMENDMENT OF THE JUDGMENT

Defendant's motion for amendment of the judgment is clearly based on the proposition that, as a matter of law, malicious prosecution and abuse of process are nothing more than state common law claims and cannot substan-

tiate plaintiff's claim under 42 U.S.C. § 1983. According to this motion, the fact that the jury answered in the negative when asked whether defendant's actions were motivated by retaliation for plaintiff's First Amendment exercise, is evidence that the jury's other findings that plaintiff's rights had been violated were not supported by the evidence. These arguments must fail.

The questions which the jury answered in finding liability against defendant Senn, which were supported by sufficient evidence, established that she had maliciously prosecuted plaintiff for nursing home violations which were not based on probable cause, and that she had abused the process concerning the procedure by which plaintiff could vindicate itself. The nursing home violation citations written by her started a process which could have resulted in denial of the nursing home's right to receive patients, a property right by virtue of various provisions of state law. There was also evidence that she involved herself in the hearing process although she was not personally and directly responsible for a number of subsequent events that followed naturally from the initial issuance of citations.

As the Court has previously stated, an abuse of process is, by definition, a denial of due process. *Jennings v. Shuman,* 567 F.2d 1213 (3rd Cir. 1977). The Court is further persuaded that its prior ruling on essentially the same point was correct by the following language from *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979):

> An action for malicious prosecution may be brought under Section 1983, if, acting under color of state law, the defendant has subjected the plaintiff to a deprivation of a constitutional magnitude.

Id. at 630. The malicious prosecution did subject plaintiff to such a deprivation. The fact that the actions of defendant Senn were not motivated by plaintiff's exercise of the First Amendment is utterly inconsequential.

II. JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant Senn's motion for judgment notwithstanding the verdict is based on the fact that she is garbed with prosecutorial immunity by virtue of having the authority, under § 50.04(4), to issue citations to nursing homes. This Court allowed exactly this question to go to the jury with significant misgivings. The Court saw little or no relationship to the duties of a prosecutor as set forth in *Butz v. Economou,* 438 U.S. 478 (1978), and the cases which preceded it, and the duties of defendant Senn. The jury apparently saw no relationship either as they answered the question as to whether she was subject to prosecutorial immunity in the negative.

The Court believed then, and believes now, that the actions which resulted in the finding of her liability were acts analogous to those of a police officer in making an arrest. Police officers have no such immunity and neither does defendant Senn.

Accordingly,

ORDER

IT IS ORDERED that defendant's motion for amendment of the judgment is DENIED.

IT IS FURTHER ORDERED that defendant's motion for judgment notwithstanding the verdict is DENIED.

Entered this 3rd day of December, 1982.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

———o———

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 79-C-570

CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs,

v.

DONALD E. PERCY, et al.,

Defendants.

ANSWER TO SECOND AMENDED COMPLAINT

---

* * * *

FIFTH DEFENSE

56. As to all matters relevant to the pleadings contained in plaintiff's complaint, defendants Siegel and Van De Grift, as attorneys connected with the prosecution of administrative proceedings enjoy prosecutorial immunity from liability.

* * * *

Dated this 1st day of July, 1982.

BRONSON C. LA FOLLETTE
Attorney General

/s/ STEVEN C. UNDERWOOD
/s/ CHARLES D. HOORNSTRA

———o———

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

Date: June 5, 1979

To: Thomas G. Van de Grift

From: Donald P. Johns
Assistant Attorney General

Subject: *Department of Health & Social Services v. Cameo Convalescent Center, Inc., and Dragomir Kresovic*

• • • •

By way of background for informational purposes for those recipients of this memo who are not totally aware of the nature of the assignment, I was asked last month to prepare, serve and file pleadings under sec. 885.12, Stats., and schedule a hearing designed to compel the home to honor the three subpoenas previously issued by Examiner Tom Patterson in the name of the home rather than in the name of one of the home's officers or the custodian of the records. The reasons for taking this action rather than re-serving the subpoenas in the name of an individual were (1) that there is authority for the proposition that a corporate entity must obey a subpoena duces tecum if served on one of its officers and (2) that the home has continually failed to cooperate in the administrative hearing before the department.

• • • •

Hesslink began by reciting numerous jurisdictional concerns which he desired to state on the record. He then indicated a desire to take Siegel's testimony and that of his two clients and, in response to a question from the judge, indicated that this testimony would take probably at least an hour or an hour and a half. Although [Judge] Jones made no oral expression, I noted a hint of displeasure in his facial expression. During this conference he asked me why the subpoenas were not re-served instead of taking this approach. In truthfulness, I had to inform him that the possibility of re-serving the subpoenas was dis-

cussed and would serve the purpose, in part, but that this action was necessary because of the home's lack of cooperation in other respects as well as on this issue.

* * * *

Later that afternoon I had occasion to discuss the matter informally with Judge Jones off the record. By way of background, Judge Jones and I have been close personal friends since the late 1950's, and we not only roomed together for a year or so but he was the best man at my wedding.

* * * *

[I]t was his feeling that he could not grant any practical relief of assistance to your department or by way of educating, admonishing or penalizing the respondents. Notwithstanding our repeated discussion relative to the home's continued lack of cooperation during these proceedings, he felt that they got the picture that the department meant business and that they incurred a sufficient "penalty" by having to attend the hearing.

(Exhibit 169)

* * * *

———o———

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

Date: June 13, 1979

To: Thomas Vandegrift, Attorney
Enforcement Section

From: Via Fran Richards, HFS-RN, Supervisor
District 2, Milwaukee

Darla Senn, HFS-RN
District 2, Milwaukee

I am writing this to recap recent happenings/conversations and phone calls with you for the record. On June 6, 1979, we met briefly in your office to discuss the continuance of Cameo administrative hearing to which you

have been newly assigned as the attorney. At that time you stated to me that you intended to use a "new plan of approach" which you explained was to "ask to meet with the Cameo attorney, Mr. Hesslink, and the Cameo owners". This you planned to do on June 11, 1978 [sic], the day the hearing was scheduled to resume. The purpose you said was to tell them the State was prepared to "match dollar for dollar on hearing/enforcement" but "they would have to correct the violations anyway" and that this approach which you described as creating a "wedge" was indicated as it is your belief the Cameo attorney is "milking" the Cameo owners, the Kresovics.

(Exhibit 176)

* * * *

———o———

[SUMMARY OF NOTICES OF VIOLATION]

Cameo Convalescent Center 1979 [sic] Survey

The following NOVs have severe problems either as a result of poor methodology of investigation, incorrect citations or lack of documentation.

NOV#	
111805(B)	Cited as 32.08(3)c, 32.08(6), 32.08(6)c This NOV based upon failure of home to meet "Master Staffing Plan." They do meet minimum staffing requirement.
111806(B)	Cited as 32.08(F)(g), 32.10(1) This NOV is based upon the same facts relied upon in NOV 111805
111810(B)	Cited as 32.11(1)d, 32.11(1), 32.11(1)b The evidence used to support this NOV ignored the fact that the treatment, i.e., Foley Catheter, was ordered by the doctor. The evidenced [sic] indicated that there may be a problem in this area, but alone does not substantiate a violation, i.e., one of every twelve patients have decubiti.

111823(C) 32.12(2)(a)
This NOV stated that the facility lacked a sufficient supply of restraints. The surveyor came to this conclusion based on the fact that she saw bed linen used as restraints. The V.V. showed that there was a sufficient supply of commercial restraints-just not used.

See 32.055(1)k

101082(C) Cited as 32.23(1)
The regulation does not set down time requirements for this type of inservice. The facility had completed one less than 1½ years previous.

101083(C) Cited as 32.055(1)k
This NOV duplicated 111809

111808(C) 32.10(3)(a)
This NOV needs documentation. It also is incorrectly cited.

111813(B) 32.20(5)(c)
This NOV was incorrectly cited.
The examples do not fit the code section.

The following NOVs are questionable as far as documentation and methodology.

111817(C) 32.20(6)(e)(2) (very weak)
The surveyor asked someone else to read the thermometer. Basic hearsay problem - extremely poor investigation.

111811(B) 32.11(1)c 32.11(1)f
This NOV deals with bedrest of patients without doctor's orders. Although there is documentation here, the surveyor did not see if there were any other factors that would have explained the situation.

111812(B) 32.11(2) 32.11(2)d
The former is too general a cite.

The allegation is that all 30 Foley Catheter patients are involved. There has to be documentation of this.

111824(C) 32.19(1) (Weak)
Incorrect citation; it should have been under 32.25(3)(g)

111807(C) 32.10(2)a 32.10(4)(b) (Weak) 32.10(2)c
Of the examples used a portion were contained in another manual, one is ridiculous and one is of questionable significance.

111804(C) 32.08(3)o (Weak)
This NOV deals with monthly nursing meetings. The facility says that it has information that will substantiate its position. The surveyor should have investigated further.

111728(C) 32.05(4)1
A technical violation, but arguably it is correct.

111807(C) 32.07(2)(c)2
The home states that the information was available but not in its correct place. This needed further investigation.

111829(C) 32.25(3)a (Weak)
Minister or priest's phone number. This NOV is nitpicking. The home had the parish number listed. The surveyor did not follow up by asking the residents if this was sufficient.

111816

111827(C) 32.20(6)h
Miscited, but one of them should be used.

111815(C) 32.20(4)(c) - disregard 32.20(7)b
This NOV needs further substantiation in the form of drug administration sheets.

111825 F268
This violation will depend upon review of pharmaceutical records. In this case the

three "irregularities" were documented in the pharmacist's private notes.

111819(C) 32.20(9)(a)i (Weak)
This NOV has severe evidentiary problems as a result of the investigation. The surveyor called up the pharmacy, talked with an unidentified person and received the information upon which this NOV was based.

111820(C) 32.20(9)(a)2 - better cite
32.20(3)h (Weak)
As with 111819 this information gained through a telephone conversation with unidentified party.

NOVs possibly to be withdrawn.

111805 Cite 32.08(6)
Darla's response gave no examples of lack of basic care. She could not cite examples of lack of patient care.

111806 The sections cited are not supported by the body of the NOV.

111825 The information request was not produced. It is my opinion that the information was not here. This is a deficiency on the part of the pharmacist but not the facility.

111824 incorrect citation
cited under H32.19 but should be under H32.25(3)(g)

111817 The surveyor based the violation on the statements of another party. Basic hearsay problem.

111827 Duplicated 111816

111820 or 111819

Both are based upon hearsay.
The latter is to be dropped

(Exhibit 315)

———o———

[Date:] November 13, 1979

[To:] Chuck Fiss
Via Peg Smelser
Lou Remily

[From:] Tom Van de Grift
Stephen Youngerman

[Subject:] 1978 Cameo Survey

The hearing for this survey will be held at the end of this month, and we have made a final review of the NOVs. Throughout August and September we presented a total of 15 NOVs that were legally insufficient or without a factual basis that were used in negotiations. At hearing we propose to withdraw the following NOVs:

111802, 111808, 111810, 111814, 111816, 111819, 111820, 111823, 111824, 111829, 101082, 101083, and the federal cite for 111729, for a total of 11.

Three of these NOVs have not been presented to you prior to this time, they are NOVs #111814, 111816, and 111729. We are asking that these be withdrawn because of incorrect citations and incomplete documentation.

We expect to complete the nurse's testimony in these two days. This constitutes the major portion of our case, so we hope to have the hearing wrapped up as soon as possible after that time.

TVG:SY:jb (Exhibit 217)

———o———

December 14, 1979

Mr. Dragomir Kresovic
Administrator
Cameo Convalescent Center
5790 South 27th Street
Milwaukee, Wisconsin 53221

Re: 1978 Survey

Dear Mr. Kresovic:

On November 19, 1979, our attorney indicated at the administrative hearing that the Bureau of Quality Compliance

was withdrawing a number of NOV's. The Bureau of Quality Compliance does not consider the factual matters presented in the following NOV's to have been indicative of a violation of H32 Wisconsin Administrative Code, Chapter 50, Wis. Stats. or the applicable Federal Regulations.

This letter is to confirm that these NOV's have been withdrawn:

111802, 111808, 111814, 111819, 111820, 111823, 111824, 111829, 101082, 101083. 111816 was consolidated with another NOV.

If there are any questions, please contact Mr. Stephen Youngerman at (608) 266-0087.

Sincerely,

Peggy Ann Smelser
Acting Bureau Director
Bureau of Quality Compiance
cc: S. Youngerman
J. Fryback
J. Kervin

(Exhibit 233)

———o———

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

Date: December 28, 1979 File Ref: Confidential

To: File

From: Tom Van de Grift
Stephen Youngerman

Subject: Cameo 1978 Survey Hearing

An analysis has been done on those NOVs still in issue at the hearing. There are 20 NOVs, one of which is strong, seven are okay, two are less than okay, six are weak and four are extremely weak.

The major problem we have is the surveyor, specifically, the lack of information she has previously provided the Department's attorneys. This has left us open to an attack on the factual basis of the NOVs.

TVG:SY:jb

cc: Peg Smelser
Judy Fryback

(Exhibit 237)

THE COURT: Thank you, counsel. Members of the jury, now that you've heard the evidence and the closing arguments, it becomes my duty to give you the instructions of the Court as to the law which is applicable to this case.

* * * *

The plaintiffs' claim. The plaintiff alleges in this case that it was harassed in retaliation for its exercise of its First Amendment rights to free speech and to petition the government for a redress of grievances and that it was deprived of property without due process of law, contrary to the rights guaranteed by the Fourteenth Amendment.

* * * *

Statute. There is a Statute 1983 of Title 42 of the United States Code Annotated. It provides that any inhabitant of this federal district may seek redress in this court, by way of damages, against any person or persons who, under color of any law, statute, ordinance or regulation, or custom, knowingly subject such inhabitant to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

Now the purpose of the Civil Rights Act. The statute, we call it 1983. The statute just outlined to you comprises one of the Civil Rights Acts enacted by Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Consti-

tution provides: no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Malicious prosecution . . .

* * * *

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

* * * *

No. 84-680

In The
Supreme Court Of The United States
October Term, 1984

CAMEO CONVALESCENT CENTER, INC.,
a Wisconsin corporation,
Cross-Petitioner,

v.

DARLA SENN, et al.,
Cross-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

QUESTIONS PRESENTED

1. Is a malicious prosecution in a state administrative proceeding,

without more, a deprivation actionable under 42 U.S.C. sec. 1983?

2. Did the Court of Appeals invade a function of the jury in determining that cross-respondent Senn's initiation of the administrative proceedings did not subject cross-petitioner to the subsequent event of a deprivation of placement on the suspension of referrals list without a hearing?

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STATEMENT OF THE CASE

Cross-respondent takes exception to cross-petitioner Cameo's suggestion that Senn, by failing to cooperate with agency personnel, was responsible for delays in hearings to which Cameo was entitled and Cameo's veiled implication that the jury might have found that her failure to cooperate was responsible for the placement of Cameo on the suspension of referrals list (SORL) without a hearing.

Senn had resisted disclosure of her personal notes taken during the course of the September 19, 1978, survey on the grounds that they were confidential. On advice of counsel, however, these notes were produced by November 1, 1978. (Trial exs. 25, 31, 32, 33, 39-41, 50,

1020; tr. (Siegel) 9/17/82 at 178-80.) The SORL did not issue until April 4, 1979. (Ex. 121.)

Cameo did not receive a hearing within thirty days although Wisconsin law requires a hearing in that time. However, that thirty-day period ran from the time Cameo appealed Senn's NOVs, which was on September 28, 1978. (Ex. 36.) Further, Wisconsin law provided for a single hearing if a nursing home appealed NOVs and a plan of correction (POC) was imposed. Wis. Stats. sec. 50.04(4)(e) (1977) (pet. for cert. app. at 114.) A POC was imposed on Cameo on October 17, 1978. (Ex. 47.) Moreover, Wisconsin administrative practice had construed the thirty-day

requirement as directory and not mandatory. (Tr. (Patterson) 9/18/82 at 297-98.) Finally, that there was no nexus between Senn's initial issuance of NOVs in September and the placement of Cameo on the SORL the following April was determined by the jury (pet. for cert. app. at 66), by the district court (cross-pet. for cert. app. at 2A), and by the Court of Appeals. (Pet. for cert. app. at 46-47.)

Cross-respondent Senn believes Cameo's description of the court's instructions to the jury for finding liability is incomplete. The court instructed the jury that it could find liability against Senn on a number of different bases: for malicious prosecution, for abuse of process, for retaliation for first amendment activity, for a denial of due process in

connection with placement of Cameo on the SORL, or for the denial of a timely hearing on the NOVs and the POC. (Tr. 9/21/82 at 140-44.) The jury found liability only for malicious prosecution and abuse of process.

SUMMARY OF ARGUMENT

A malicious prosecution or abuse of process, without more, is not actionable as a deprivation under 42 U.S.C. sec. 1983. Indeed, state actors are absolutely immune from the decision to initiate or continue administrative proceedings. The lower courts consistently have held that a malicious prosecution can become actionable only if it additionally subjects the plaintiff to an independent deprivation.

The Court of Appeals did not invade the jury's function in concluding that Senn's NOVs in September 1978 did not subject Cameo to the deprivation of placement in April 1979 on the SORL without a hearing. The jury so found. The district court so found. And the other circumstances of the case warranted the Court of Appeals' conclusion that the connection between the NOVs and the SORL was too attenuated to find the necessary nexus, or affirmative link, to say that Senn subjected Cameo to the SORL deprivation.

ARGUMENT

I. The Law Is Settled That A Malicious Prosecution, Without More, Does Not Constitute A Deprivation Actionable Under 42 U.S.C. Sec. 1983.

Cameo suggests that it is ironic this Court has not ruled when a malicious prosecution or abuse of process is an actionable constitutional tort.

But it is not ironic. Malicious prosecution always has been thought of as a state law tort. This Court consistently has eschewed converting every state tort by a state actor into a constitutional claim. See Baker v. McCollan, 443 U.S. 137, 146 (1979); Paul v. Davis, 424 U.S. 693, 701 (1976). Indeed, this Court has absolutely immunized state actors from malicious prosecution liability stemming from

their decision to initiate or continue those proceedings, noting that the "decision to proceed with a case is subject to scrutiny in the proceeding itself" and that claims of unconstitutional proceedings are reviewable by the courts. Butz v. Economou, 438 U.S. 478, 516 (1978).

Consistent with these principles, the lower courts uniformly hold that a malicious prosecution or abuse of process is not itself an actionable deprivation. See Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir. 1979); Buckley Towers, Etc. v. Buchwald, 595 F.2d 253, 254 (5th Cir. 1979); Beker Phosphate Corp. v. Muirhead, 581 F.2d 1187, 1189 (5th Cir. 1978); Paskaly v. Seale, 506 F.2d 1209, 1211 (9th Cir.

1974); Curry v. Ragan, 257 F.2d 449 (5th Cir.), cert. denied, 358 U.S. 851 (1958); Cramer v. Crutchfield, 496 F. Supp. 949, 953 (E.D. Va. 1980), aff'd., 648 F.2d 943 (4th Cir. 1981).

Cameo's attempt to portray a conflict among the circuits confuses the rule that malicious prosecution, without more, is not actionable with the rule that it is actionable if it also subjects the plaintiff to a constitutional deprivation.

Cameo relies on Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), to show a conflict among the circuits. Marrero, however, concerned the independent deprivations from an illegal search and seizure and publicly issued

defamatory statements impairing protected business interests; nowhere did it suggest that a malicious prosecution, without more, is actionable. Consequently, Marrero is not at all inconsistent with the Fifth Circuit's holdings in Beker Phosphate Corp. v. Muirhead, Curry v. Ragan, or Buckley Towers, Etc. v. Buchwald.

Nor was the Seventh Circuit inconsistent with Hampton v. City of Chicago, 484 F.2d 602, 609 (7th Cir. 1973). There the court held only that the unfounded prosecution and concealment of the truth "aggravated the plaintiffs' injuries" of the independent deprivations of false arrest and imprisonment.

Nor was the First Circuit at odds with this rule in Roy v. City of Augusta, Maine, 712 F.2d 1517, 1524 (1st Cir. 1983). There, a state court had ordered the grant of a business license to the plaintiff, but the city refused to grant it and thereby succeeded in "'taking' his property in derogation of the process afforded by the state."

Nor did the Ninth Circuit contradict its Paskaly v. Seale holding in Mayer v. Wedgewood Neighborhood Coalition, 707 F.2d 1020, 1023 (9th Cir. 1983). It simply upheld a defendant's right to obtain costs for a frivolous suit, leaving the question of the plaintiff's motives for resolution as a factual matter rather than on the pleadings.

Nor was the Tenth Circuit at odds with the rule in Wells v. Ward, 470 F.2d 1185 (10th Cir. 1972). The court held only that there was no "deprivation" by an arrest and detention for refusing to agree to appear on a traffic violation charge. Similarly, Madison v. Manter, 441 F.2d 537 (1st Cir. 1971), involving an invalid search, held only that the officers who acted negligently but in good faith in obtaining the warrant were not liable in damages.

To be sure, Henry v. City of Minneapolis, 512 F. Supp. 293, 296 (D. Minn. 1981), noted a lack of consistency among the cases. But 'the lack' of consistency related to the degree of deprivation necessary to make an accompanying malicious prosecution actionable. The same court had no trouble, after reviewing all the cases,

in saying that the successful plaintiffs' cases "involved a greater invasion of personal liberty than the mere apprehension of proceedings... ." 512 F. Supp. at 297.

Finally, Cameo relies on Jennings v. Shuman, 567 F. 2d 1213, 1220 (3rd Cir. 1977), for the rule that an abuse of process is "by definition a denial of procedural due process" actionable under sec. 1983. Jennings, however, did not hold that abuse of process is actionable as a violation of due process. It held the abuse was actionable because of the "deprivation of liberty concomitant to arrest," and added that such "deprivations without due process state an injury actionable under section 1983." 567 F.2d at 1220. Further, even if Jennings did hold that abuse of process or a denial of due process

itself is actionable, apart from an independent deprivation, the holding has been eclipsed by Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983), that a denial of due process is not itself an actionable deprivation.

II. The Court Of Appeals Did Not Invade The Jury Function Of Determining Causation

Cameo contends the Court of Appeals invaded a jury function in ruling there was no causal connection between Senn's NOVs and its placement on the SORL without a hearing. Cameo cites the general rules that a court should not reverse a jury finding on causation and that a court should try to harmonize

apparently conflicting jury answers. The Court of Appeals failed to harmonize and failed to uphold a liability verdict, Cameo asserts, because it upset the finding of liability on malicious prosecution by reliance on the no-liability finding on placement on the SORL.

The Court of Appeals did not reverse a jury finding that Senn's NOVs proximately caused placement on the SORL. Cameo admits it never asked that the jury so find. (Cross-pet. at 20.) Cameo seeks to overcome this omission by saying that, since the jury knew Cameo was protesting a deprivation, the jury found a causal connection between the NOVs and the SORL in finding liability for the NOVs.

The jury's basing liability on malicious prosecution is not a finding of causation for placement on the SORL. The contrary is not made credible because Cameo asserts it.

Moreover, the jury was separately instructed on liability for malicious prosecution and liability for the SORL. (Tr. 9/21/82 at 140-44; brief in opp. app.). Thus, on Cameo's assumption that the jury followed the instructions, the jury knew it could find liability from either the malicious prosecution or the SORL or both. It found liability only for the malicious prosecution. Cameo's argument actually would require the Court to assume the jury was confused and meant one thing when it said another.

The Court of Appeals did not fail to harmonize the liability finding for malicious prosecution with the no-liability finding for the SORL. Rather, the Court of Appeals held that there can be no liability for malicious prosecution, without more, and that the no-liability finding on the SORL evidenced the jury's finding that there was not more because it found Senn was not responsible for placing Cameo on the SORL without a hearing.

Cameo mistakenly characterizes the district court as having found a causal connection between Senn's NOVs and the SORL. In fact, the district court found no causation. It said Senn was "not personally and directly responsible for

a number of subsequent events that followed." (Cross-pet.-app. at 2A.) That language is a finding of no causation with the subsequent event of the SORL.

Moreover, that language, coupled with the prior sentence that Senn's NOVs started a process which "could have resulted in the denial" of a property right, was the district court's recitation of evidence supporting the jury finding of malicious prosecution. It is anything but a finding that the process which "could have" resulted in a property deprivation did work a deprivation.

Cameo argues that, even if the jury found no causation or failed to find causation, the Court of Appeals should have found it as a matter of law because Senn's tortious NOVs converged with the

denial of predeprivation hearing for the SORL. Placement on the SORL, with or without a hearing, could not have occurred but for the existence of the outstanding Senn NOVs, Cameo argues.

Now Cameo wants the Court to displace the jury. Its argument conveniently ignores the effect of the jury verdict of no responsibility for placement on the SORL, and it conveniently ignores the district court's concurrence in that conclusion.

Further, Cameo's argument confuses conditions with proximate causation. On Cameo's approach, Senn's supervisor would be a joint tortfeasor, for Senn would not have issued the NOVs but for the supervisor's assigment to inspect Cameo, and the person who hired Senn similarly would be liable on this but-for theory. But to "subject" or "cause

to be subjected" to a deprivation under sec. 1983, requires a causal nexus that is the "affirmative link" between the act and the deprivation. See Rizzo v. Goode, 423 U.S. 362, 371, 375-76 (1975).

The fact is, too much separated the NOVs from the SORL to enable the Court of Appeals to find the affirmative link as a matter of law. Cameo acknowledges the intervention of verification visits by two inspectors on January 2, 1979. Had they determined that there were no uncorrected NOVs, there would have been no eligibility for the April SORL. Wis. Stats. sec. 50.04(4)(d) (1977) (Pet. App. at 113.) Thus, it was the uncorrected status of the NOVs as perceived by two independent investigators that determined eligibility for the SORL the next April. Second, after the results of the

January investigation came the notice to Cameo of an intent to place it on the SORL, followed by Cameo's appeal and request for a hearing, followed by mislaying the appeal until after the SORL issued without hearing. (Pet. App. at 71-76, 78-81, 84-85, 86, 92-94.) Clearly there was no foreseeability in September of 1978 that this series of events would unfold. Superseding factors caused Cameo's placement on the SORL without a hearing, not the initial issuance of NOVs the previous September. At best, they were separate torts, not joint torts.

In any event, the Court of Appeals did not depart from clearly established

rulings of this Court in concluding that the connection between the NOVs and the SORL was too attenuated to support a holding of direct responsibility for the affirmative link as a matter of law.

Should this Court nevertheless grant review of this issue, it will be necessary also to dispose of Senn's defense of prosecutorial immunity. For a reversal of the Seventh Circuit on the ground of causation would not require affirmance of the trial court's judgment against Senn.

Senn argued that, even if her NOVs proximately caused placement on the SORL without a prior hearing, the issuance of the NOVs initiated an administrative proceeding. Absolute prosecutorial immunity attaches to the decision to

initiate or continue administrative hearings. Butz v. Economou, 438 U.S. 478, 515 (1978). Both the district court (Cross-pet. App. at 2A) and the cross-petitioner agree that Senn's NOVs started the process. (Cross-pet. at 24.) Indeed, that is the basis of cross-petitioner's proximate cause argument. The function of prosecutorial immunity is to insulate this kind of decision from suits for malicious prosecution. The Court of Appeals declined to address this argument because judgment against Senn had to be reversed on other grounds. (Pet. for cert. app. at 47.)

CONCLUSION

It is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

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CROSS-RESPONDENT'S APPENDIX

From the Transcript of September 21, 1982, at 140-44.

Instructions to the jury

Now, the purpose of the Civil Rights Act. The statute, we call it 1983. The statute just outlined to you comprises one of the Civil Rights Acts enacted by Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides: no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Malicious prosecution. Plaintiffs claim that defendants, in preparing for filing and prosecuting the Notices of Violation, maliciously prosecuted Cameo Convalescent Center. To find the

defendants or any one of them are liable for malicious prosecution, the plaintiff must show, in addition to several facts which are uncontested, one, any of the defendants prepared Notices of Violation without probable cause; two, there was malice in preparing or prosecuting the Notices of Violation against Cameo.

Plaintiff bears the burden of convincing you that both elements have been established by a preponderance of the evidence.

First probable cause. The term probable cause is defined to be such a state of facts within the knowledge of the defendant as would lead a person of ordinary caution and prudence to believe that the person investigated is guilty of the violation charged.

Whether the facts known to the defendants were such as to lead them, as

people of ordinary caution and prudence, to believe and entertain an honest and strong suspicion that the plaintiff was guilty of such charge is a question of fact to be determined by you, the jurors, in this case.

The burden of proof to show that there was a lack of probable cuase on the part of the defendants rests upon the plaintiff to so establish such lack of probable cause to a reasonable certainty, by the greater weight of the credible evidence in this case.

Malice. That means a condition of mind which prompts a person to do a wrongful act willfully; that is, on purpose, to the injury of another or to do intentionally a wrongful act toward another without justification or excuse.

Abuse of process. Plaintiff also claims that defendants should be held liable for abuse of process. To prevail on this claim, plaintiffs again must show by a preponderance of the evidence the following two elements: one, that the Notices of Violation were prepared and prosecuted against Cameo Convalescent Center due to an ulterior and improper motive; and, two, that defendants threatened or acted in a manner not authorized by the administrative process.

There's a First Amendment claim. In order to prove the claim that its rights to free speech and to petition the government were violated by a defendant, the burden is upon the plaintiff, Cameo Convalescent Center, to establish by a preponderance of the evidence in the case that an act of a

defendant was motivated by retaliation for plaintiff's exercise of its rights to free speech or to petition the government for redress of grievances.

It's not necessary for the plaintiff to prove the defendants' entire or sole reasons for taking the action which they alleged were taken, nor to prove such to have been an important reason; rather they must only prove that such a reason was one of the things that moved the defendants to make the decision the defendants made.

If you find that the plaintiff's speech or exercise of its rights was one of the things that contributed to the decisions to take the actions which the defendants may have taken, then you should find that the plaintiff's exercise of its rights motivated the defendants' actions or failure to act.

On the other hand, if you find that the plaintiff's actions were not one of the things that contributed to the decisions of the defendants, then you should find that those actions by the plaintiff were not a motivating factor.

Now, once the plaintiff has established that retalitation for the exercise of these rights motivated defendants' acts, then the burden shifts. The defendants must then demonstrate by a preponderance of the evidence that the defendants would have taken the same actions in the absence of such an improper motive.

If defendants carry their burden, they may not be found liable for violation of plaintiffs' rights to free speech or petition the government for redress of greivances.

Due process. To recover on their claim for violation of due process, the plaintiff, Cameo Convalescent Center, must show by a preponderance of the evidence that a defendant or defendants were personally and directly responsible for placing Cameo on the suspension of referrals list and acted with intentional disregard of Cameo's right to appeal this placement. In the alternative, plaintiffs must show that Cameo was denied a timely hearing on the Notices of Violation and the imposition of a plan of correction.

(3)

No. 84-680

In The
Supreme Court Of The United States
October Term, 1984

CAMEO CONVALESCENT CENTER, INC.,
a Wisconsin corporation,

Cross-Petitioner,

v.

DARLA SENN, et al,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The facts of this case are as stated in our original cross-petition for the writ. Cameo does, however, take exception to a statement made in the

Statement of the Case submitted by the cross-respondent, Darla Senn.

At page 8 of the cross-respondent's brief, Ms. Senn states that the jury, the district court, and the Court of Appeals all found that there was no nexus between Senn's initial issuance of the NOV's in September and the placement of Cameo on the SORL. In fact, neither the jury nor the district court ever made such a determination. Indeed, as we indicated in our original cross-petition, based on the court's instructions, and the jury's finding of abuse of process and malicious prosecution in the context of a §1983 action, we believe that the jury, by its verdict, made exactly the opposite finding.

SUMMARY OF ARGUMENT

Most of the arguments advanced by the cross-respondent in its brief in opposition to the cross-petition were adequately addressed in our original brief. However, the cross-respondent's argument, that Olim v. Wakinekona, 103 S.Ct. 1741 (1983) eclipsed any prior holdings by the circuit courts that an abuse of process violated due process in the context of a proceeding in which a protected liberty or property interest was at stake, is an unwarranted extension of that decision.

In addition, this Court's holding in Rizzo v. Goode, 423 U.S. 362 (1975) does not preclude a jury finding that Senn's issuance and pursuit of the original NOV's was the proximate cause

of Cameo's placement on the Suspension of Referrals List.

ARGUMENT

The original cross-petition for the writ of certiorari advanced two primary arguments in support of this Court's granting of the writ. First of all, the cross-petition argued that there was a conflict among the circuits as to just what elements must be established in order to state a due process claim under 42 U.S.C. §1983, for an abuse of process or malicious prosecution, undertaken under color of state law, by a public official. Secondly, the cross-petition argued that the circuit court violated previous decisions of this Court, and the province of the jury, when it vacated the judgment entered against Darla Senn.

In response to our first argument, the cross-respondent contends that this Court's decision in Olim v. Wakinekona, 103 S.Ct. 1741, 1748 (1983) "eclipsed" those circuit court decisions which held that it was not always necessary to establish an independent deprivation of a protected interest, other than the interest at stake in the proceeding itself, in order to establish that a malicious prosecution or abuse of process constituted an actionable 42 U.S.C. §1983 claim. In response to our second line of argument, the cross-respondent argued that this Court's decision in Rizzo v. Goode, 423 U.S. 362, 371, 375-376 (1975) precludes a finding that Darla Senn's initial issuance and pursuit of the NOV's was

the proximate cause of Cameo's placement on the SORL.

For the reasons which follow, neither of those two arguments has merit.

I. OLIM V. WAKINEKONA IS NOT APPLICABLE TO THIS CASE.

Our cross-petition argued that this Court should assert jurisdiction because it has never determined the nature of the required protected interests in the context of an abuse of process claim under the Civil Rights Act. Specifically, this Court has never decided whether a liberty or property interest need be at stake in the proceeding or needs to have been actually taken in order to trigger due process protection. The cross-respondent argued that the issue is foreclosed by Olim, supra.

Olim was an action by a state prisoner in the Hawaii state penitentiary challenging his transfer to a prison on the mainland. The prisoner had contended that his transfer to the mainland without a prior evidentiary adversary hearing deprived him of a liberty interest without due process of law in violation of the Fourteenth Amendment and §1983.

In finding that the prisoner's due process rights had not been violated, this Court relied heavily upon the change in status of the prisoner which had occurred due to his criminal conviction. The Court held that conviction changed the prisoner's status so as to extinguish most of his liberty interests. This Court then went on to find that confinement in a certain prison, or even

in a certain state, was not one of those liberty interests which survived criminal conviction, stating that:

> "Confinement in another state, unlike confinement in a mental institution, is 'within the normal limits or range of custody which the conviction has authorized the state to impose.'" 103 S.Ct. at p. 1746.

The Court then concluded that, because there was no protected interest at stake, no hearing was required by the due process clause.

Cameo has suffered no criminal conviction nor any similar circumstance, which would in any way serve to reduce its normal range of protected interests. Thus, Cameo was clearly entitled to an evidentiary hearing prior to the imposition of any of the sanctions which would have ensued had Cameo not

contested the original issuance of the notices of violation.

The question which we hope to present to the Court is whether the abuse or misuse of that hearing process, as well as its actual denial, constitutes a violation of due process and §1983. In deciding this question, the rationale upon which this Court decided Olim, supra, is simply inapplicable.

II. RIZZO V. GOODE DOES NOT DECIDE CROSS-PETITIONER'S CLAIMS.

The cross-respondent also argues that this Court's decision in Rizzo v. Goode, 423 U.S. 362, 371, 375-76 (1975), has already decided the proximate cause issue adversely to the cross-petitioner. In fact, Rizzo, supra, did not deal at all with the question of whether a specific constitutional tort was the proxi-

mate cause of a deprivation so as to trigger §1983 liability.

In Rizzo, supra, this Court specifically concluded that there were deprivations of protected interests which had occurred. That was not even an issue in the case.

The question before this Court in Rizzo was whether isolated violations of individuals' civil rights were sufficient to support a broad-based mandatory injunction, issued by the district court, against the entire police department. This Court concluded that, in the specific context of that case, that such isolated violations were not sufficient.

In reaching that conclusion, the Court noted that the officers who had engaged in those civil rights violations were not even parties to the action. It

also noted that plaintiffs had not established involvement or condonation of these acts by the department management. Based on this set of circumstances, this Court concluded that a few isolated incidents of civil rights violations, without more, was insufficient to support a broad-based mandatory injunction.

There is no broad-based injunction against the department even at issue in this proceeding. Moreover, the individual whom the jury concluded had committed the act, Darla Senn, is a party, in fact the party, to this proceeding. Thus, the holding of Rizzo, supra, does not in any way affect the question of whether this Court should review the propriety of the 7th Circuit Court of

Appeals decision setting aside the jury verdict on the proximate cause issue.

Cross-respondent's argument that Cameo never requested the jury to make a specific finding of proximate cause for placement on the SORL also misses the point. Cameo is not seeking to invalidate the jury verdict because of faulty instructions, cross-respondent is.

In reality, Cameo proposed a general proximate cause instruction. (R. 149) Cross-respondent also proposed a general instruction, not a specific instruction on the SORL question. (Resp. App. 25A) Thus, the cross-respondent cannot now be heard to argue that the verdict was improper because a specific proximate cause instruction on the SORL was not given.

The cross-respondent also argues that, if this Court were to conclude that the circuit court did improperly set aside the jury verdict on the proximate cause issue, that verdict would still need to be re-examined in light of the prosecutorial immunity question. Unfortunately for the cross-respondent, no such re-examination is necessary. Darla Senn never raised prosecutorial immunity as a defense in her answer to the complaint. (Cross-Pet. App. 4A) Moreover, the issue was submitted to thejury over cross-petitioner's objection, and the jury found no immunity.

Finally, even if one were to find the verdict improper because the specific causation instruction was not given, the appropriate remedy would have

been to remand for a new trial on the question, not to have the appellate court make its own factual finding of no proximate cause.

CONCLUSION

It is respectfully submitted that this Court should grant the cross-petition for the writ of certiorari and review the case on its merits.

Respectfully submitted,

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